

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 Hologram USA, Inc., *et al.*,)

4)
5 Plaintiffs,)

6 vs.)

7 Pulse Evolution Corporation, *et al.*,)

8 Defendants.)
9

Case No.: 2:14-cv-0772-GMN-NJK

ORDER

10 Pending before the Court is the Motion to Dismiss, (ECF No. 210), filed by Pulse
11 Evolution Corporation, Pulse Entertainment Corporation, John Textor, and William James
12 Rock. Plaintiffs Hologram USA, Inc., Uwe Maass, and MDH Hologram Limited filed a
13 Response in opposition, (ECF No. 213), and Defendants replied, (ECF No. 215).

14 **I. BACKGROUND**

15 This case centers upon allegations that a performance by a holographic projection of
16 Michael Jackson at the Billboard Music Awards on May 18, 2014, infringed several of
17 Plaintiffs' patents. In their Second Amended Complaint ("SAC"), Plaintiffs claim that they
18 obtained the exclusive rights to patented technology that creates three-dimensional images
19 which are virtually indistinguishable from real performers ("hologram technology") in
20 February 2014. (SAC ¶¶ 2, 10, ECF No. 188). Plaintiffs allege that Defendants approached
21 them in April and May of 2014 seeking to acquire the rights to the hologram technology to
22 create a holographic Michael Jackson performance at the 2014 Billboard Music Awards. (*Id.* ¶
23 2). Despite Plaintiffs' refusal to license the hologram technology, the award show prominently
24 featured a performance in which a holographic projection of Michael Jackson danced, twirled,
25 and moonwalked around the stage to the rhythm of a previously unreleased song. (*Id.* ¶ 3).
Plaintiffs allege that this performance infringed their patents, and also that many of the

1 Defendants have since falsely claimed to numerous media outlets and potential customers that
2 they own the technology used to generate the Michael Jackson hologram. (*Id.* ¶ 40).

3 Based on these allegations, the SAC states that Defendants infringed three separate
4 patents, U.S. Patent Nos. 5,865,519 (“the ’519 patent”), 7,883,212 (“the ’212 patent”), and
5 8,328,361 (“the ’361 patent”). (*Id.* ¶¶ 59-80). The SAC also sets forth claims for willful
6 infringement, active inducement, contributory infringement, injunctive relief, intentional
7 interference with prospective economic advantage, breach of fiduciary duty, false advertising,
8 and unfair competition. (*Id.* ¶¶ 81-136).

9 In the instant Motion, Defendants seek to dismiss Plaintiffs’ claims regarding the ‘561
10 patent pursuant to Federal Rule of Civil Procedure 12(b)(6).

11 **II. LEGAL STANDARD**

12 “A motion to dismiss for failure to state a claim upon which relief can be granted is a
13 purely procedure question not pertaining to patent law.” *McZeal v. Sprint Nextel Corp.*, 501
14 F.3d 1354, 1355-56 (Fed. Cir. 2007). Accordingly, this Court applies the law of the regional
15 circuit, the Ninth Circuit, when analyzing whether a complaint alleging patent infringement
16 states a valid claim. *Id.* at 1356.

17 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
18 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
19 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
20 which it rests, and although a court must take all factual allegations as true, legal conclusions
21 couched as a factual allegation are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
22 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
23 of a cause of action will not do.” *Id.*

24 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
25 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “A claim has facial plausibility

1 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
2 that the defendant is liable for the misconduct alleged.” *Id.* This standard “asks for more than a
3 sheer possibility that a defendant has acted unlawfully.” *Id.*

4 “Generally, a district court may not consider any material beyond the pleadings in ruling
5 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
6 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the
7 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a
8 complaint and whose authenticity no party questions, but which are not physically attached to
9 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
10 converting the motion to dismiss into a motion for summary judgment. *E.g., Branch v. Tunnell*,
11 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice
12 of “matters of public record.” *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.
13 1986). Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss
14 is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

15 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
16 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
17 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
18 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
19 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
20 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
21 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
22 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

23 **III. DISCUSSION**

24 Courts analyze whether a complaint alleging patent infringement has sufficiently stated a
25 claim for relief by comparing the complaint against the requirements that were formerly set

1 forth in Form 18 of the Federal Rules of Civil Procedure.¹ See *K-Tech Telecomm., Inc. v. Time*
2 *Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (applying the Ninth Circuit law in
3 reversing a district court's grant of a motion to dismiss); see also *In re Bill of Lading*
4 *Transmission and Processing Sys. Patent Litigation*, 681 F.3d 1323, 1333-34 (Fed. Cir. 2012)
5 (noting that *Twombly* and its progeny "address[ed] the civil pleading standards in a variety of
6 civil contexts," none of which "address[ed] the sufficiency of a complaint alleging patent
7 infringement or causes of action for which there is a sample complaint in the Appendix of
8 Forms to the Federal Rules of Civil Procedure").

9 In order to sufficiently state a claim for patent infringement, a plaintiff need only set
10 forth "(1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a
11 statement that defendant has been infringing the patent 'by making, selling, and using [the
12 device] embodying the patent'; (4) a statement that the plaintiff has given the defendant notice
13 of its infringement; and (5) a demand for an injunction and damages." *K-Tech*, 714 F.3d at
14 1283 (quoting *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007)).

15 In this case, Plaintiffs have satisfied the requirements of Form 18 in regard to their
16 claims that Defendants infringed the '519 patent. First, the SAC states that the Court "has
17 jurisdiction over the subject matter of this Complaint pursuant to 28 U.S.C. §§ 1331 and 1338."
18 (SAC ¶ 24). Second, Plaintiffs specifically state that Plaintiff Maass owns the '519 patent. (*Id.*
19 ¶¶ 5, 61). Third, Plaintiffs allege that Defendants "have been, are currently and, unless
20 enjoined, will continue to directly infringe one or more claims of the '519 patent by making,
21 using, offering to sell, and selling within the United States the patented invention. Defendants'

23 ¹ Though Form 18 and Rule 84 were abrogated from the Federal Rules of Civil Procedure as of December 1,
24 2015, the Advisory Committee note associated with this change directly states, "The abrogation of Rule 84 does
25 not alter existing pleading standards or otherwise change the requirements of Civil Rule 8." Fed. R. Civ. P. 84
(2015 Advisory Committee Note). Thus, the Court refers to previously existing standards in ruling upon the
instant Motion.

1 products and services embody and/or practice one or more claims of the ‘519 patent literally
2 and/or under the doctrine of equivalents.” (*Id.* ¶ 16). Fourth, the SAC states that “Hologram
3 USA has placed Defendants on notice of their infringing activities, but Defendants refuse to
4 stop using the Plaintiffs’ patented technology.” (*Id.* ¶ 48). Finally, Plaintiffs assert that
5 Defendants’ infringing acts have caused Plaintiffs to suffer damages, (*id.* ¶ 64), and that, under
6 Rule 65, Plaintiffs are entitled to a permanent injunction, (*id.* ¶ 105).

7 Though Defendants do not dispute that Plaintiffs have pled all of the necessary
8 components of a patent infringement claim, they nonetheless argue that the Court should grant
9 their Motion to Dismiss because a diagram attached to the SAC definitively shows that the
10 holographic projection at the 2014 Billboard Music Awards did not infringe the ‘519 patent.
11 However, with this argument, Defendants seek to enforce a standard which borders upon that of
12 summary judgment, far exceeding the pleading standard for a patent infringement claim. The
13 diagram in question was published in a USA Today article which described the technology
14 used to create the holographic projection in general terms. (Ex. E to SAC)². While this diagram
15 may have been helpful to a general audience of readers who wanted to learn more about the
16 performance, it does not constitute judicially noticeable evidence which would warrant
17 dismissal of Plaintiffs’ claims at the pleading stage.

18 It is not clear to the Court, nor apparent from the diagram, that the images contained
19 therein are a true and accurate depiction of the technology that was used in the performance.
20 As a result, the Court is unwilling to rely solely on this diagram, which was published prior to
21 discovery, in resolving the complex factual questions raised by Plaintiffs’ claims. Accordingly,
22 the Court finds Defendants’ request to be premature, and the instant Motion will be denied.


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25 ² See also Marco della Cava, *Meet the Conjurers of Michael Jackson’s Ghost*, USA Today (January 14, 2016, 11:09 AM), <http://www.usatoday.com/story/life/music/2014/05/22/michael-jackson-billboard-music-awards-illusion/9437881/>.

DATED this 15 day of January, 2016.

2016.



Gloria M. Navarro, Chief Judge
United States District Court